IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8503 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

J R PANDIT

Versus

DIST.PANCHAYAT

Appearance:

MR AS SUPEHIA for MR IS SUPEHIA for Petitioner

MR SIRAJ GORI for MR HARIN P RAVAL for Respondent

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 09/03/2001

ORAL JUDGEMENT

1. This petition filed under Article 226 of the Constitution demonstrates the arbitrary and illegal order passed by the respondent/District Panchayat retiring the petitioner, a Lady Social Educational Organizer (Mukhya Sevika), compulsorily, on the alleged extraneous ground of sickness with retrospective effect, without authority

of law and without affording opportunity of hearing and thereby violating the principles of natural justice.

2. The petitioner was appointed in the year 1961 as a Lady Social Educational Organizer (Mukhya Sevika) by the respondent and posted at Taluka level office under the District Panchayat. After considering her sincerity, efficiency and good service record, she was appointed on the post of Assistant Child Welfare Organizer by the respondent by order dated March 6, 1987 and posted at Dediapada. On account of her sickness, she took charge at Dediapada on November 21, 1987 after producing fitness certificate issued by the Neurologist, Civil Hospital, Ahmedabad. The petitioner thereafter continued to work at Dediapada as an Assistant Child Welfare Organizer. As she remained sick, she had availed leave from February 17, 1989 to February 24, 1989. Thereafter when she went to resume duties on February 27, 1989 she was not permitted to work by the Child Welfare Organizer but she was informed vide letter dated March 9, 1989, a copy of which is annexed at Annexure A, to remain present in the meeting in respect of Family Welfare Programme to be held on March 15, 1989 and accordingly the petitioner had attended the said meeting.

3. Thereafter the petitioner received a letter dated June 6, 1989 written by the Child Welfare Organizer, Dediapada, informing her that she was declared unfit to discharge her duties by the Civil Surgeon, Bharuch, vide certificate dated April 3, 1989 and as per the discussion with the District Development Officer on June 5, 1989, she should not come to discharge her duties at the office or visit any centre. A copy of the said letter dated June 6, 1989 is annexed at Annexure B. According to the petitioner, the said certificate dated April 3, 1989 alleged to have been issued by the Civil Surgeon, Bharuch was to the effect that the petitioner was fit for less laborious service than the service performed by her. The said certificate is annexed at Annexure C. The petitioner gave a reply dated June 16, 1989 informing the Child Welfare Officer that he was not the competent authority to restrain her from discharging her duties and hence till the competent authority passes an order for invalidity pension, she would remain in service. It is further say of the petitioner that as she has not been paid salary since March 1989, she has filed Regular Civil Suit No.21 of 1989 in the Civil Court (J.D.)., Dediapada against the respondent for the recovery of her salary for two months and for injunction restraining the respondent from stopping the salary payable to her every month. The said suit is still pending.

4. Thereafter suddenly the petitioner received the order dated October 9/11, 1989 passed by the respondent retiring her compulsorily from service on the ground of unfitness under Rule 165-A of the Bombay Civil Services Rules, 1959 ('the Rules' for short hereinafter) with effect from April 30, 1989 pursuant to the certificate issued by the Civil Surgeon, Bharuch. The said order is annexed at Annexure D to the petition. According to the petitioner, the said action of the respondent retiring her compulsorily on the ground of unfitness with retrospective effect from April 30, 1989 is highly arbitrary, illegal, unjust and violative of the fundamental rights guaranteed to the petitioner under Articles 14 and 16 of the Constitution of India inasmuch as even though the petitioner was in service till the date of the issuance of the order dated October 11, 1989, she has been retired by the respondent with retrospective effect from April 30, 1989, as mentioned in the said order which has caused great injustice to the petitioner. The petitioner, therefore, averred that the respondent has discriminated her from amongst the persons similarly situated by depriving her of the retirement benefits and the salary for the period she was on duty by giving retrospective effect to the order of compulsory retirement as mentioned in the impugned order. The petitioner, therefore, prays to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India quashing and setting aside the impugned order dated October 9/11, 1989 and directing the respondent to reinstate her in service with all consequential benefits.

5. The petition is contested by the respondent by filing its reply affidavit. On behalf of the respondent, Kumari Meeta A. Dave, Programme Officer, ICDS, District Panchayat, Bharuch has filed her affidavit and denied all the averments made in the petition. It is further stated therein that on the basis of the certificate dated April 3, 1989 issued by the Civil Surgeon, Bharuch and having regard to the provisions of Rule 165A of the Rules, the District Development Officer vide order dated October 9/11, 1989 has compulsorily retired the petitioner from service which action is not at all illegal and the order is in accordance with law. It is further, inter alia, stated therein that though the petitioner has obtained fitness certificate from Civil Hospital, Ahmedabad, and remained present at the office of Bal Vikas Yojna, at Dediapada, she could not carry out her work in the office as she was not able to speak clearly and, therefore, it

was not possible to assign any work to her and as the petitioner was sick and was positively unfit for being employed and on the basis of the certificate issued by the Civil Surgeon, Bharuch, she was not competent to continue in employment on account of physical unfitness, a written proposal was made by the officer of Bal Vikas Yojna, Dediapada and after having considered the said proposal, the District Development Officer by communication dated June 6, 1989 informed the officer of the Bal Vikas Yojna accordingly to take action under Rule 165A of the Rules and the District Development Officer has acted as an administrative head of the District Panchayat and there is no illegality in the said action and the officer of the Bal Vikas Yojna was required to seek guidance from the District Development Officer and was bound to act in accordance therewith and, therefore, the order of compulsory retirement passed against the petitioner is just and proper. It is also mentioned in the affidavit in reply that the petitioner was in service prior to April 1, 1963 and as the Panchayat employees are Government servants their service conditions are subject to the provisions of the Rules which are applicable to them. Lastly it is stated that as per the record available and as per the original report, the petitioner is suffering from paralysis and, therefore, she is not fit to continue in service and taking her back in service is not in the interest of administration and hence it is urged that the petition may be dismissed.

6. Mr. Supehia, learned advocate for the petitioner, contended that the petitioner has been retired compulsorily under Rule 165A of the Rules which can be invoked in case of misconduct, insolvency or inefficiency on the part of an employee whereas the impugned order is passed on the ground of medical invalidity, relying upon the certificate dated April 3, 1989 issued by the Civil Surgeon, Bharuch. Since the petitioner was never sent for physical check up by the respondent, runs the further submission that compulsory retirement of the petitioner from service on the basis of the said certificate issued by the Civil Surgeon, Bharuch at the back of the petitioner is highly improper and is in utter disregard to the principles of natural justice and hence the order passed under the provisions of Rule 165A of the Rules is bad in law as there is no misconduct, insolvency or inefficiency alleged on the part of the petitioner. What is emphasised by the learned counsel is that even before invoking the provisions of Rule 165A of the Rules, procedures prescribed for imposing penalty are required to be followed and as per the proviso thereto before passing

any such order, procedure referred to in Note 1 to Rule 33 of the Bombay Civil Services Conduct, Discipline and Appeal Rules shall have to be followed. But in the case of the petitioner the said procedure has not been followed while making the impugned order. What is stressed by the learned counsel is that the powers under Rule 161 of the Rules could have been involved for premature retirement in the public interest but that could not have been done in the case of the petitioner as the age of the petitioner was less than 50 years on the date of the impugned order as well as her 10 to 12 years' confidential reports only were required to be considered and in that event she would have got pension, gratuity, etc. It is emphatically contended that the petitioner could have been retired on the basis of the medical certificate even on invalidity pension under the provisions of Rule 201 of the Rules on the ground that she is permanently and completely incapacitated for further service in the Government. The certificate issued by the Civil Surgeon, Bharuch is to the effect that the petitioner is unfit to carry out her duties on account of old hemiparesis and she is not in a position to speak and if she is compulsorily retired on the basis of the said certificate in that case she would have got invalid pension. The learned counsel for the petitioner has further pointed out that having put 28 years of service she was a permanent employee and service of a permanent employee could not have been terminated or compulsorily retired without complying with the provisions of Article 311 of the Constitution as compulsory retirement is one of the major penalties as per Rule 5 (7) of the Gujarat Panchayat Service (Discipline & Appeal) Rules, 1964 ('the Panchayat Rules' for short hereinafter), and the said penalty could have been imposed only after following the procedures laid down in Rule 7 of the Panchayat Rules but no such procedure is followed in the instant case inasmuch as the order is made with retrospective effect from April 30, 1989 and hence it is illegal. It is authoritatively contended by the learned counsel that service of a permanent employee cannot be terminated without affording an opportunity of hearing but in the instant case no such opportunity was given to the petitioner before passing the impugned order compulsorily retiring her from service with retrospective effect and, therefore, the impugned the order is bad in law and is required to be quashed and sets aside. He further emphasised that in case of compulsory retirement on the ground of physical incapacity, procedure prescribed under Article 311 (2) of the Constitution must be followed. In support of the aforesaid contention, the learned counsel for the

petitioner has cited judgment of this Court in the case of Digvijay B. Majmudar v. Union of India, 25 (2) GLR 1528. Lastly it is pointed out that the date of birth of the petitioner was January 4, 1941 and she had reached the age of superannuation at the age of 58 years on January 4, 1999 and, therefore, there is no question of reinstatement of the petitioner in service. However, she would be entitled to get all benefits including full backwages, promotion, etc., upto January 31, 1999 and thereafter pension, gratuity, etc., on the basis of continuity of service and he urged that this petition may be allowed by quashing and setting aside the impugned order and thereby directing the respondent to give full backwages, promotion, etc., to the petitioner upto January 31, 1999 and thereafter pension, gratuity, etc., on the basis of the continuity of service.

7. Mr. Siraj Gori, learned counsel for the respondent, contended that though the petitioner has obtained fitness certificate from Neurologist, Civil Hospital, Ahmedabad to resume duty in the office of Bal Vikas Yojna, Dediapada, she could not carry out any work in the office and was not able to speak properly and, therefore, it was not possible to assign any work to her and since she was unfit for being employed, on the basis of the certificate issued by the Civil Surgeon, Bharuch positively declaring the petitioner to be unfit, the matter was discussed with the District Development Officer, Bharuch and the petitioner is compulsorily retired under the provisions of Rule 165A of the Rules. Therefore, according to him, there is no illegality in the action on the part of the respondent. It is pointed out that the petitioner was taking treatment from the Civil Hospital, Bharuch and, therefore, Civil Surgeon, Bharuch, on proper examination, has issued certificate which positively states that the petitioner is unfit for service and, therefore, it was within the realm of authority to consider as to whether to continue the petitioner in service or to retire her compulsorily under Rule 165A of the Rules and, therefore, runs further submission that, the decision to compulsorily retire her is taken in public interest and in the interest of the administration and hence there is no question of violation of principles of natural justice. Lastly it is pointed out that the petitioner was in service prior to April 1, 1963 and as Panchayat employees are government servants they are subject to the provisions of the Rules and since the petitioner is suffering from paralysis as per last report, the petitioner is not fit to continue in service and, therefore, reinstating her in service is also not in the interest of administration and hence it

is prayed to dismiss the petition.

8. I have considered the submissions of both the learned counsel appearing for the parties, documents forming part of the petition, relevant provision of the Rules and the Panchayat Rules and the judgments cited at the bar.

9. At the outset, be it noted that so far as the contentions of the petitioner with regard to her appointment of the petitioner as a Lady Social Educational Organizer (Mukhya Sevika) by the respondent, her promotion to the post of Assistant Child Welfare Officer and thereafter her compulsory retirement under the provisions of Rule 165 of the Rules on the ground of medical sickness are not in dispute. The contention that the petitioner was never sent for physical check up by the respondent to the Civil Surgeon, Bharuch at any point of time prior to her compulsory retirement is of no assistance and consequence to the petitioner in view of the contention that the petitioner was taking treatment from Civil Hospital, Bharuch which was not denied by the petitioner by filing affidavit-in-rejoinder and, therefore, the Civil Surgeon, Bharuch had examined her at the relevant time and hence he was competent to issue such a certificate.

10. The main controversy centers around in this petition is as to whether the action of the respondent in compulsorily retiring the petitioner, who is a permanent employee suffering from ailment, under the provisions of Rule 165A of the Rules is justified? To answer the aforesaid question it would be advantageous to reproduce relevant rules which have direct bearing on the decision of this legal issue. Rule 165A of the Rules reads as under:

> "A competent authority may remove any Government servant subject to these rules from Government service, or may require him to retire from it, on the ground of misconduct, insolvency or inefficiency:
>
> Provided that before any such order is issued the procedure referred to in Note 1 to Rule 33 of the Bombay Civil Services Conduct, Discipline and Appeal Rules shall be followed.
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> Note 1.- In the case of Police Officers of subordinate ranks, a competent authority in the Police Department can exercise his discretion under this rule after observing the procedure laid down in Chapter XV of the Bombay Police

Manual, 1950, Vol.I, and Section 26 of the Bombay Police Act, 1951.

Note 2.- Except where it is expressly stated otherwise 'removal' includes the case of a Government servant, who has been asked to retire under this rule."

There is no manner of doubt that in exercise of powers conferred under Rule 165A of the Rules, the competent authority may remove or retire any government servant on the ground os misconduct, insolvency or inefficiency. However, before taking such a drastic action he has to follow the procedure laid down in the Note 1 to Rule 33 of the Bombay Civil Services Conduct, Discipline and Appeal Rules. On examining the record of the case, it is clear that the competent authority has not followed the procedure referred to above.

11. It is true that the petitioner had joined the services prior to April 1, 1963. The Panchayat employees who are appointed prior to the said date are considered as government employees and their service conditions are subject to the provisions of the Rules and, therefore, the competent authority can invoke provisions of Rules but that does not mean that the provisions of the Panchayat Rules can be ignored. Part II of the Panchayat Rules relates to discipline. Penalties are prescribed under Rule 5 thereof. It would also be advantageous to refer to Rule 5 of the Panchayat Rules which reads as under:

"5. Penalties.-- The following penalties may, for good and sufficient reasons, and as hereinafter provided be imposed on a member of the Panchayat Service, namely:--

(1) Censure, (), (4) Withholding of increments or promotions, (5) Recovery from pay of the whole or part of any pecuniary loss caused to the panchayat by negligence or breach of orders, (6) Reduction in rank including reduction to a lower post or time-scale or to a lower stage in a time-scale, (7) Compulsory retirement, (8) Removal from service not disqualifying for future employment, (9) Dismissal from service which shall ordinarily be a disqualification for future employment:

Provided that, in the case of members who have been allocated to the panchayat service under section 206 of the Act and who, according to the terms and conditions of their service which were immediately applicable to them before

such allocation were not liable to the penalty of fine, no penalty of fine shall be inflicted upon them.

Explanation-- The following shall not amount to a penalty within the meaning of this rule:-

(i) Withholding of increments of a member of the Panchayat Service for failure to pass a departmental or language examination in accordance with the rules or orders governing the service to which he belongs or the post which he for the time being holds or the terms governing his appointment.

(ii) Stoppage at the efficiency bar in the time scale of pay on the ground of his unfitness to cross the bar.

(iii) Non-promotion of a member of the Panchayat service, after consideration of his case, to a post or grade to which he is eligible, on administrative grounds unconnected with his conduct.

(iv) Reversion of a member of the Panchayat Service who is officiating in a higher service, grade or post to a lower service grade or post on the ground that after trial he is considered to be unsuitable for such higher service, grade or post or on administrative grounds not connected with his conduct.

(v) Reversion of a member of Panchayat Service, appointed on probation to another service, grade or post, during or at the end of the period of probation, to his permanent service, grade or post, in accordance with the terms of his appointment or the rules or orders governing such probation.

(vi) (a) Termination of the services of a member of the panchayat service appointed on probation during or at the end of the period of probation in accordance with the terms of appointment or the rules and orders governing such probation.

(b) Termination of the service, of a member of the Panchayat Service, employed under an agreement in accordance with the terms of such agreement.

(vii) Compulsory retirement of a member of a Panchayat Service in accordance with the provisions relating to his superannuation or retirement in the Panchayat Service and not on grounds of his conduct."

By virtue of clause (vii) of Rule 5 of the Panchayat Rules, a member of the Panchayat service can be compulsorily retired in accordance with the provisions relating to his superannuation or retirement in the panchayat service and not on grounds of his conduct.

12. At this stage it would be also appropriate to refer to Rule 7 of the Panchayat Rules which reads as under:

> "7. Procedure for imposing major penalties.-(1) No order, imposing on a member of the Panchayat Service any of the penalties specified in clauses (6) to (9) of rules shall be passed except after a formal inquiry is held as far as may be, in the manner hereinafter provided.
> xxxxx xxxxx xxxxx
> xxxxx xxxxx xxxxx"

From a plain reading of the aforesaid rule it becomes abundantly clear that without holding a formal inquiry as far as may be in the manner provided in the said rule, no order imposing penalty on a member of the Panchayat Service should be passed. In the said rule, the whole procedure is prescribed from the stage of preliminary inquiry to the conclusion of the inquiry and if the charge against the delinquent is proved then imposing of the penalty as well.

13. So far as the instant case is concerned, the petitioner has been compulsorily retired by the respondent by invoking the provisions of Rule 165A of the Rules and, therefore, the question that arises for determination is as to whether the conditions of service of an employee who joined the service of the Panchayat prior to April 1, 1963 shall be governed by the provisions of the Rules or the Panchayat Rules and secondly whether the service of a permanent Government servant who is appointed substantively to a permanent post can be terminated without giving him opportunity of hearing?

14. To answer the aforesaid two questions, now let us examine the case law decided by the Supreme Court and this Court.

15. In Parshottam Lal Dhingra v. Union of India, AIR 1958 SC 36, the Supreme Court has observed that where a person is appointed substantively to a permanent post in Government service, he normally acquires a right to hold the post until under the rules, he attains the age of

superannuation or is compulsorily retired and in the absence of a contract, express or implied, or a service rule, he cannot be turned out of his post unless the post itself is abolished or unless he is guilty of misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the service rules read with Article 311 (2). Termination of service of such a servant so appointed must per se be a punishment, for it operates as a forfeiture of the servant's rights and brings about a premature end of his employment.

16. In the case of Moti Ram Deka v. General Manager, North East Frontier Railway, AIR 1964 SC 600, the Supreme Court has held that if a Government servant was appointed to permanent post substantively, he had a right to hold that post until he reached the age of superannuation or was compulsorily retired or the post was abolished. In all other cases, if the services of the said servant were terminated, they would have to be in conformity with the provisions of Article 311 (2), because termination in such cases amounts to removal. The short facts of that case were that Moti Ram Deka was a confirmed Peon employed by the North East Frontier Railway and in purported exercise of power under rule 148 the respondent - General Manager terminated his service. The said order was challenged as being illegal. Similarly, in other appeals the amended rule 149 was challenged. The said rule gave power to the Railway Administration to terminate the service of its employees. While considering the said rules vis-a-vis Article 311 (2) of the Constitution of India and considering the history of Article 311 (2) and the scheme of Articles 309 and 310 (1) of the Constitution of India, which gives power to the President and the Governors of the respective States to hold such office during the pleasure of the President if the post is under the Union, or during the pleasure of the Governor if the post is under a State, as the case may be, the Supreme Court stated that the pleasure of the President or the Governor, as mentioned in Article 310 (1) can thus be exercised by such person as the President or the Government - may respectively direct in that behalf, and the pleasure thus exercised has to be exercised in accordance with the rules made in that behalf. However, the provision of Article 311 is not made subject to any other provision of the Constitution. Within the field covered by the said Article, it is absolute and paramount and, therefore, the Supreme Court while considering the effect of the provisions contained in Article 311 (2) observed that the effect of Article 310 (1) must be limited in the sense that in the category of cases pleasure mentioned in Article 310 (1) must be

exercised in accordance with the requirement of Article 311. In the said judgment, the Supreme Court considered various statutory service rules and then observed in para 27 as under:

> ".....Once the scope of Article 311 (1) and (2) is duly determined, it must be held that no rule framed under Article 309 can trespass on the rights guaranteed by Article 311. This position is of basic importance and must be borne in mind in dealing with the controversy in the present appeal."

In the said judgment, the Supreme Court also considered the case of Parshottam Lal Dhingra (supra) and then in para 40 observed as under:

> "In regard to permanent servant the learned Chief Justice has made some observations which it is now necessary to consider very carefully. 'The appointment of a Government Servant to a permanent post', observed learned C.J., 'may be substantive or on probation or on an officiating basis. A substantive appointment to a permanent post in public service confers normally on the servant so appointed a substantive right to the post and he becomes entitled to hold a lien on the post'. On the same subject, the learned C.J. has later added that 'in the absence of any special contract, the substantive appointment to a permanent post gives the servant so appointed a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years' service, or the post is abolished and his service cannot be terminated except by way of punishment or misconduct, negligence, inefficiency or any other disqualification found against him on proper enquiry after due notice to him. Reading these two observations together, there can be no doubt that with the exception of appointments held under special contract, the Court took the view that wherever a civil servant was appointed to permanent post substantively, he had a right to hold that post until he reached the age of superannuation or was compulsorily retired, or the post was abolished. In all other cases, if the services of the said servant were terminated, they would have to be in conformity with the provisions of Article 311 (2), because

termination in such cases amounts to removal. The two statements of the law to which we have just referred do not leave any room for doubt on this point."

17. In the case Jayshanker v. State of Rajasthan, AIR 1966 SC 492, wherein appellant Jaishanker was removed from service for overstaying his leave. The service regulations provided automatic termination of service on overstay. Question arose whether such termination amounted to removal from service, and whether the employer was required to serve show cause notice and follow the procedure. In that case, the short question before the Supreme Court was whether Jaishanker was entitled to an opportunity to show cause against the proposed punishment as required under Article 311 (2) of the Constitution of India. It was admitted that neither any charge was framed against him nor was he given any opportunity to show cause. The case on behalf of the State Government was that the Government did not terminate Jaishanker's service and that it was Jaishanker who gave up the employment by remaining absent. It was submitted before the Supreme Court that such a case was not covered by Article 311 of the Constitution of India. In support of the said contention, the State Government relied on certain regulations of the Jodhpur Service Regulations, and regulation 7 thereof laid down that leave could not be claimed as a right, and that the Government had discretion to refuse or revoke leave of any description. Regulation 11 of the said Regulations provided that an individual who had been granted leave on medical grounds for a period of one month or more may not return to duty without producing a certificate of fitness signed by an officer authorised by a general or special order to grant such certificate. Regulation 12 was to the effect that an individual who absented himself without permission or remained absent at the end of his leave was entitled to no salary for the period of such absence and that period would be debited against his leave account unless the leave was sanctioned or extended under the ordinary rules by the competent authority. Regulation 13, which is material, was as follows:

"An individual who absents himself without permission or who remains absent without permission for one month or longer after the end of his leave should be considered to have sacrificed his appointment an may only be reinstated with the sanction of the competent authority.

Note.-- The submission of an application for extension of leave already granted does not entitle an individual to absent himself without permission."

In view of the aforesaid regulation No.13, it was contended that the said regulation operated automatically and no question of removal from service could arise because Jaishanker must be considered to have sacrificed his appointment. Under the Regulation he could only be reinstated with the sanction of the competent authority. The question for determination before the Supreme Court was whether the said regulation was sufficient to enable the Government to remove a person from service without giving him an opportunity of showing cause against that punishment, if any. Thereafter, the Supreme Court made the following pertinent observations:

"..... We do not think that the constitutional protection can be taken away in this manner by a side wind. While, on the one hand, there is no compulsion on the part of the Government to retain a person in service if he is unfit and deserves dismissal or removal, on the other a person is entitled to continue in service if he wants until his service is terminated in accordance with law. One circumstance deserving removal may be overstaying one's leave. This is a fault which may entitle Government in a suitable case to consider a man as unfit to continue in service. But even if a regulation is made it is necessary that Government should give the person an opportunity of showing cause why he should not be removed..... The regulation, no doubt, speaks of reinstatement but it really comes to this that a person would not be reinstated if he is ordered to be discharged or removed from service..... It may be convenient to describe him as seeking reinstatement but this is not tantamount to saying that because the person will only be reinstated by an appropriate authority that the removal is automatic and outside the protection of Article 311. A removal is removal and if it is punishment for overstaying one's leave an opportunity must be given to the person against whom such an order is proposed, no matter how the Regulation describes it. To give no opportunity is to go against Article 311 and this is what has happened here.

In our judgment, Jaishanker was entitled

to an opportunity to show cause against the proposed removal from service on his overstaying his leave and as no such opportunity was given to him his removal from service was illegal. He is entitled to this declaration."

18. In the case of Dhangauri Valji Bhatt v. District Panchayat, Amreli, 22 GLR 320 it was held by this Court that termination of the service of an employee under Rule 5 of the Panchayat Rules without giving any notice to show cause was invalid. It was further observed in the said case that the removal from service is one of the major punishments as contemplated by Rule 5 of the Panchayat Rules and the procedure as prescribed by Rule 7 for imposing such a major penalty was not followed and hence application of Explanations (vi) (a) and (b) of Rule 5 was out of the picture in that case. It must, therefore, necessarily follow that the termination of the plaintiff from service was by way of penalty. Even minimum principles of natural justice would have required an opportunity of hearing to be given to the plaintiff before such a penalty order could be passed against the plaintiff. But nothing of that sort was done in that case, and all of a sudden, without any inquiry of whatsoever against the plaintiff, the impugned order came to be passed by the Administrative Officer. If such an order does not amount to penalty it is difficult to comprehend which order can be said to amount to a penal order especially when by a stroke of pen a Panchayat servant is removed from the service on the allegation of insubordination and absence of devotion to duty. It was further held in the said case that it is very clear that if a Government servant or a Panchayat servant is to be removed from service on account of insubordination or alleged non-compliance of the directions of the superior authority for joining the training course the action of the authority seeking termination of the services of such an employee would clearly amount to imposition of a penalty on such an employee and consequently before passing such an order of termination by way of penalty the minimum requirement of principles of natural justice as well as the procedure of rule 7 and the provisions of Article 311 (2) of the Constitution have got to be followed.

19. Applying the principles enunciated by the Supreme Court and this Court in the above referred to judgments to the facts of the present case, there is no manner of doubt that service of either government servant or Panchayat servant cannot be terminated without following the provisions of Article 311 (2) of the Constitution and

without following the minimum requirement of principles of natural justify as well as Procedure of rule 7 of the Panchayat Rules.

20. Be it stated that so far as the petitioner is concerned, whether it is the Rules or the Panchayat Rules that should govern her case makes no difference as before passing any order under Rule 165A of the Rules, not only the procedures prescribed under Rule 33 of the Bombay Civil Service (Discipline & Appeal) Rules but the procedures prescribed under Rule 7 of the Panchayat Rules shall have also to be followed. In both of the Rules there is no distinction about the termination of service of an employee without giving any notice to show cause and without following the principles of natural justice is passed.

21. To canvass the proposition that in case of compulsory retirement on the ground of physical incapacity procedures prescribed under Article 311 (2) must be followed, the learned counsel for the petitioner has relied on the judgment of this Court in the case of Digvijay B. Majmudar v. Union of India (supra). In the said decision, after considering the judgments of the Supreme Court in the case of Parshottam Lal Dhingra (supra) and Moti Ram Deka (supra), this Court has observed as under:

> "Termination of service by way of compulsory retirement of a servant even on the ground that he is incapable of performing his duties on account of unfitness amounts to removal from service within the meaning of Article 311 (2) of the Constitution of India, does not fall within the recognised exceptions viz., compulsory retirement on account of public interest when he reaches certain age, and completes the qualified period of service, nor his case falls within the preview of superannuation or special contract. Physical incapacity of an employee may amount to inefficiency and incapacity to perform his duties. However, before his service is terminated, he should be heard or offered an opportunity to be heard as has been prescribed under the rules, and if there are no rules, then an opportunity envisaged by Article 311 (2) of the Constitution of India must be given."

So far as the petitioner's case is concerned, according to the respondents, she was found unfit to continue on the present post. It is the case of the respondents that

the petitioner was also irregular in the employment and used to go on leave frequently. If she was irregular in the employment and used to go on leave frequently, that has to be viewed in light of the principles enunciated by the Supreme Court and this Court in the judgments to which reference is made in earlier paragraphs of this judgment. The petitioner was serving as an Assistant Child Welfare Organiser. As per the certificate issued by the Civil Surgeon, Bharuch, he was of the opinion that she was fit to continue on a less laborious service. Unless and until the petitioner is asked to give her explanation how can the authority come to the conclusion that she was in the habit of being irregular in the employment. In the instant case, the petitioner was not issued any show cause notice as to why her services should not be terminated on the ground of her being unfit to carry out her duties. The respondents ought to have given her a show cause notice showing her unfitness in continuing in service and the action proposed to be taken against her. If they had given a show cause notice the petitioner could have replied to it. If they had issued a show cause notice to her, then they could have brought on record the evidence in the form of the certificate issued by the Civil Surgeon, Bharuch, based on which the action proposed to be taken against her and they could have very well said that principles of natural justice were observed. The petitioner was entitled to an opportunity to show cause against the proposed termination from service on her unfitness and as no such opportunity was given to her, her termination from service is illegal. Therefore, though the respondent had a certificate from the Civil Surgeon, Bharuch, on that basis they had not issued any show cause notice to the petitioner to show cause as to why on the basis of that certificate her services should not be terminated. Since the respondents had not followed these procedures before terminating her services, the termination order deserves to be quashed and set aside.

22. Seen in the above context, it is clear that no such opportunity has been given to the petitioner nor any procedure prescribed for removal, etc., either under the Rules or the Panchayat Rules has been followed. Therefore, the impugned order passed by the competent authority cannot be sustained. In the result, therefore, the impugned order being passed in violation of the principals of natural justice and the procedure that has been prescribed under the Rules and the Panchayat Rules having not been followed, requires to be quashed and set aside by accepting the petition.

23. It may be stated that the date of birth of the petitioner was January 4, 1941 and, therefore, she has completed the age of 58 years, i.e., the age of superannuation on January 4, 1999. In this view of the matter, so far as as the reinstatement of the petitioner in service is concerned, no order can be passed at this stage. However, since the impugned order is quashed and set aside on the grounds stated in the foregoing paragraphs of this judgment, naturally she is entitled to all the benefits of service, including backwages, upto the date of her superannuation and thereafter pension, gratuity, etc., on the basis of continuity of service.

24. For the forgoing reasons, the petition succeeds in part and accordingly it is partly allowed. The impugned order dated October 9-11/1989, at Annexure D to the petition, is quashed and set aside and consequently it is ordered that the petitioner shall be entitled to all the benefits of service including full backwages, etc., upto January 1, 1999 (till the date of her superannuation) and thereafter pension, gratuity, etc., on the basis of the continuity of service. The respondents are directed to comply with this order within three months from today. Rule is made absolute to the aforesaid extent with costs.

March 9, 2001. (A. M. Kapadia, J.)

(karan)